

## Questions/Comments for WNDR Regarding Selected WI LAR Issues 09.06.2016

### Issue 3

Based on EPA's review of the State's corrections to its regulations, it appears that the State has made needed corrections to Wis. Admin. Code NR §§ 203.135 and 203.136, which provide for the modification, revocation and reissuance, or termination of permits, and sets forth the causes for such actions. However, Wis. Stat. § 283.63 continues to require "5 or more persons" to request an action to terminate (or request other actions relating to) a permit.

### Issue 21

- Wis. Admin. Code NR § 201.03(7): is it possible to have a draft permit with a fact sheet when there is not a tentative determination to issue a permit?
- Wis. Admin. Code NR § 201.03(7)(a): The federal regulation at 40 C.F.R. § 124.56(b)(1)(iv) requires the fact sheet contain explanations of limits set on a case by case basis under 40 C.F.R. §§ 125.3 (c)(2) or (c)(3) or pursuant to CWA Sec. 405(d)(4). Would WNDR consider amending this section to specifically cite the federal regulations mentioned at 40 C.F.R. 124.56(b)(1)(iv)?
- Wis. Admin. Code NR § 201.03(7)(b): Where is the Wisconsin equivalent to 40 C.F.R. § 124.56(b)(1)(v), including its reference to 40 C.F.R. § 122.4(i)?
- Wis. Admin. Code NR § 201.03(7)(e): Wisconsin appears not to have an equivalent provision requiring the description of how the land application plan's individual elements have been specifically incorporated into the permit, as required by 40 C.F.R. § 124.56(e). Where is Wisconsin's equivalent provision?
- Regarding the content of fact sheets when there is a variance or alternative standard, 40 C.F.R. § 124.56 references 40 C.F.R. § 124.8(b)(5) that provides:

(5) Reasons why any requested variances or alternatives to required standards do or do not appear justified. [Emphasis added.]

The analogous Wisconsin regulation, Wis. Admin. Code NR § 201.03(12)(c), provides:

(12) Any of the following supplemental information shall also be attached to the fact sheet to provide supporting information for permit limits, conditions, or other requirements when applicable to the permitted discharge. . . .

(c) Water quality variance or alternative effluent limit.

Would Wis. Admin. Code NR § 201.03(12)(c) require the inclusion in fact sheets of the reasons why a variance or alternative standard was not justified?

## Issue 22

The notification requirements at Wis. Admin. Code NR § 203.02(4) do not appear to incorporate the notification of certain other governmental agencies found in 40 C.F.R. §§ 124.10(C)(1)(ii)-(iv):

- (ii) Any other agency which the Director knows has issued or is required to issue NPDES, 404, or sludge management permit (including EPA when the draft permit is prepared by the State);
- (iii) Federal and State agencies with jurisdiction over fish, shellfish, and wildlife resources and over coastal zone management plans, the Advisory Council on Historic Preservation, State Historic Preservation Officers, including any affected States (Indian Tribes). (For purposes of this paragraph, and in the context of the Underground Injection Control Program only, the term State includes Indian Tribes treated as States.)
- (iv) For NPDES and 404 permits only, any State agency responsible for plan development under CWA section 208(b)(2), 208(b)(4) or 303(e) and the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service. . . .

Please clarify where in Wisconsin's regulations the notifications of the above governmental agencies are incorporated.

## Issues 23 and 26

The exemptions from the requirement to apply for a permit for certain Municipal Separate Storm Sewer Systems (MS4s) and construction sites will be eliminated when WDNR issues a general permit for storm water discharges from transportation activities.

- When does WDNR plan to issue the general permit?
- Will WDNR issue separate general permits for storm water discharges from MS4s and construction activities associated with transportation activities?
- Does WDNR intend to amend or delete the regulatory provisions in Wis. Admin. Code NR § 216.002 and NR § 216.42(5)?

## Issue 27

We note that Wis. Stat. § 283.01 continues to define "new source" based on the commencement of construction of a point source, whereas, the federal new source definition at 40 C.F.R. § 122.2 is based on commencement of construction of the source. The Clean Water Act defines "source" as "any building, structure, facility or installation from which there is or may be the discharge of pollutants." 33 U.S.C. § 1316(a)(3). The Clean Water Act defines "Point source," as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The state should either explain why they believe the use of "point source" is appropriate or change the definition to "source."

## Issues 48 and 50

Regarding the termination of permits, the federal regulation 40 C.F.R. § 122.64(a)(1) provides:

(a) The following are causes for terminating a permit during its term, or for denying a permit renewal application:

(1) Noncompliance by the permittee with any condition of the permit;

The analogous Wisconsin rule appears to require a higher threshold for permit termination—“substantial noncompliance” rather than “noncompliance,” see Wis. Admin. Code NR § 203.136(3)(a) which provides:

TERMINATION. The department may terminate a permit, or deny an application for reissuance, for any of the following causes:

(a) Substantial noncompliance by the permittee with any condition of a permit. [Emphasis added.]

Please explain how the Wisconsin rule is consistent with the federal analogue.

Also, regarding Issue 50:

Language at 40 C.F.R. 122.64 (b), states that “The Director shall follow the applicable procedures in part 124 or part 22 of this chapter, as appropriate (or state procedures equivalent to part 124) in terminating any NPDES permit under this section, except that if the entire discharge is permanently terminated by elimination of the flow or by connection to a POTW (but not by land application or disposal into a well), the director may terminate the permit by notice to the permittee.” However, the Wisconsin NR 203.135 (6) states “permanent elimination of a discharge” while 40 C.F.R. § 122.64(b) requires that “the entire discharge is permanently terminated by elimination of the flow. . .” Please explain how the Wisconsin rule is consistent with the federal analogue. [Emphasis added.]

The Wisconsin rule at Wis. Admin. Code NR § 203.135(6)(b) has additional language that provides:

(b) If the department tentatively decides to terminate a permit due to permanent elimination of a discharge that is due to a facility closure, connection to a publicly owned treatment works or some other cause, the department may terminate the permit by written notice to the permittee. The termination of the permit shall be effective 30 days after the notice is sent, unless the permittee files a written objection of the termination with the department within the 30 day time period. If a notice of objection is filed by the permittee, then the department shall follow the procedures for preparation of a draft permit under s. NR 200.11. [Emphasis added.]

Please explain what is meant by the term “other cause.” Does this include, for example, land application or disposal into a well?

**Issue 49**

Wisconsin's definition of new source, Wis. Admin. Code NR § 205.07(1)(q)(1), does not include the more detailed definitions found in 40 C.F.R. §§ 122.29(b)(1)(i)-(iii), 122.29(b)(2) and 122.29(b)(3). For example, C.F.R. §§ 122.29(b)(1)(i)-(iii) provide:

(b) Criteria for new source determination.

(1) Except as otherwise provided in an applicable new source performance standard, a source is a "new source" if it meets the definition of "new source" in § 122.2, and

*(i) It is constructed at a site at which no other source is located; or*

*(ii) It totally replaces the process or production equipment that causes the discharge of pollutants at an existing source; or*

*(iii) Its processes are substantially independent of an existing source at the same site. In determining whether these processes are substantially independent, the Director shall consider such factors as the extent to which the new facility is integrated with the existing plant; and the extent to which the new facility is engaged in the same general type of activity as the existing source. [Emphasis added]*

Please clarify where in Wisconsin's regulations the analogous new source definitions from above are incorporated.

**Issue 65**

40 C.F.R. § 124.6 at subparts (d) and (e) outline the requirements for preparation of a draft permit:

(d) (Applicable to State programs, see § 123.25 (NPDES)...) If the Director decides to prepare a draft permit, he or she shall prepare a draft permit that contains the following information:

(1) All conditions under §§ 122.41 and 122.43 (NPDES)...

(2) All compliance schedules under § 122.47 (NPDES)...

(3) All monitoring requirements under § 122.48 (NPDES)....; and

(4) For ... (v) NPDES permits, effluent limitations, standards, prohibitions . . . and conditions under §§ 122.41, 122.42, and 122.44, including when applicable any conditions certified by a State agency under § 124.55, and all variances that are to be included under § 124.63.

EPA would like to discuss with WDNR the detailed citations in Wisconsin statutes or code that address each of the provisions above.

**Issue 66**

Regarding fact sheets and their distribution on request, the federal regulation at 40 C.F.R. § 124.8(a) provides:

(Applicable to State programs, see §§ 123.25 (NPDES) ...)

(a) A fact sheet shall be prepared for every draft permit for a ...NPDES facility or activity, ... for every NPDES general permit (§ ... 122.28). The fact sheet shall briefly set forth the principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit. The Director shall send this fact sheet to the applicant and, on request, to any other person. [Emphasis added.]

The analogue in Wisconsin's rules appears to require a higher threshold for fact sheet distribution on request—to any interested person versus any other person—as Wis. Admin. Code NR § 201.01 provides:

The purpose of this chapter is to identify when the department shall prepare a fact sheet for a draft Wisconsin Pollutant Discharge Elimination System (WPDES) permit, and what information shall be included in the fact sheet. The fact sheet describes the discharge to be permitted with a brief explanation of the draft permit's effluent limits, monitoring requirements, and other conditions. The department shall send a copy of the fact sheet to the applicant and any interested person upon request. [Emphasis added.]

Please explain how the Wisconsin rule is consistent with the federal regulation.

### Other Issue to Be Discussed

To shift Issue 56 to “Issues Provisionally Addressed by WDNR’s Implementation, to Be Resolved by Future Rulemaking” category WDNR must revise Form 3400-195 as follows:

- to ensure that all permittees (including those that did not enter into any formal written agreements) are required to provide notice in accordance with 40 C.F.R. § 122.34(g)(3)(v), Wisconsin should modify question (d) under the Form’s Section IV as follows:

“Is the municipality relying on another governmental entity to satisfy some of its permit obligations as provided under section 2.10 (Cooperation) of the general permit? Yes/No

If, yes describe these cooperative efforts.”

- we recommend that WDNR include a reference to Wis. Stat. § 283.37(5), in addition to Wis. Admin. Code NR § 216, so that any permittee can easily find the statutory source of the department’s authority to request information not listed at Wis. Admin. Code NR § 216.07(8); and
- we recommend that WDNR ensure that facilities not covered under Wisconsin’s MS4 General Permit No. WI-S050075-2 (i.e., all Phase I (large and medium) and all Phase II (small) MS4s), obtain appropriate coverage by revising the Form 3400-195’s title to indicate all the discharger categories covered. Changes to this form would also address Issue 67 (Required storm water evaluation and assessment).